Filed 3/29/10 In re D.S. CA5

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

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| In re D.S., a Person Coming Under the Juvenile Court Law. | |
| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>D.S.,<br><br>Defendant and Appellant. | F057457<br><br>(Super. Ct. No. JJD058550)<br><br>**OPINION** |

APPEAL from a judgment of the Superior Court of Tulare County. Valeriano Saucedo, Judge.

Maureen M. Bodo, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Michael P. Farrell, Assistant Attorney General, Stephen G. Herndon and Melissa Lipon, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant, D.S., appeals from an order of the juvenile court in which he was found to have committed first degree burglary; he asserts there was no substantial evidence to support the court's finding that he committed burglary, because the evidence did not show he intended to commit theft or any felony at the time he entered the victim's residence. He also contends he was provided ineffective assistance of counsel when his attorney failed to object to a witness's identification of him in court. We affirm.

## ***FACTUAL AND PROCEDURAL BACKGROUND***

By juvenile wardship petition, D.S. was charged with one count of first degree residential burglary. (Welf. & Inst. Code, § 602; Pen. Code, § 459.) D.S. moved to suppress all evidence, including any third party identification, resulting from an allegedly illegal detention of D.S. At the hearing on that motion, Officer Art Cabello testified that, on November 29, 2008, at approximately 5:00 p.m., he was dispatched to a possible burglary and given a description of the suspects: two African-American males, average build, one carrying a backpack and one wearing black pants and a white shirt. On the way to the reporting party's location, he saw D.S., an African-American male juvenile, wearing all black, leaving the general area where the suspects were last seen. He pulled up next to D.S. and exited the car; as he approached, he observed the young man was breathing heavily and had sweat on his lip. Officer Cabello detained D.S. The court concluded that, with the exception of being African-American, D.S. did not fit the description of either of the suspects; it ruled his detention was illegal and suppressed any evidence obtained as a result of that detention, including any third party identification.

At the jurisdictional hearing, the following evidence was received. On November 29, 2008, just before 5:00 p.m., William McPhetridge walked to the house of his niece, Karen Ramirez, which was two doors down from his house. As he approached her driveway, he saw a light come on in the garage. He looked in a window in the garage door and saw two young men, African-American or dark skinned, one wearing black pants and a white shirt with a dark shirt underneath, and the other carrying a backpack;

they were going through the door from the house into the garage. McPhetridge slammed his hand against the metal garage door; the two young men looked up, then ran across the garage and out the door to the side yard. McPhetridge ran to the side gate and started to climb over it; both young men looked up at him, then ran toward the backyard. In court, McPhetridge positively identified D.S. as one of the two young men he saw in his niece's garage. Nothing was taken from Ramirez's house. The occupants of the house were not present, having left 15 minutes earlier. Ramirez had not given anyone permission to be in her house. The court found the allegations of the petition to be true.

D.S. appeals, contending (1) there was insufficient evidence he committed burglary because there was no evidence he intended to commit larceny or any felony when he entered Ramirez's house and (2) his counsel was ineffective in that she failed to object to McPhetridge's in-court identification of defendant as one of the young men he saw in Ramirez's house.

## ***DISCUSSION***

### I. Sufficiency of the Evidence

#### *A. Standard of review*

"Where the juvenile court has sustained a petition, an attack on the sufficiency of the evidence to support that ruling is governed by the substantial evidence rule. [Citation.] 'The test on appeal is whether substantial evidence supports the conclusion of the trier of fact, not whether the evidence proves guilt beyond a reasonable doubt. The court must view the entire record in the light most favorable to the judgment (order) to determine whether it discloses substantial evidence–that is, evidence which is reasonable, credible, and of solid value–such that a reasonable trier of fact could find the minor guilty beyond a reasonable doubt.' [Citation.]" (*In re Andrew I.* (1991) 230 Cal.App.3d 572, 577.)

### *B. Evidence of intent*

Burglary is defined as entry into any house or other specified structure "with intent to commit grand or petit larceny or any felony." (Pen. Code, § 459.) "One may be liable for burglary upon entry with the requisite intent, regardless of whether the felony or theft actually committed is different from that originally contemplated, or whether any felony or theft actually is committed. [Citation.]" (*In re Matthew A.* (2008) 165 Cal.App.4th 537, 540.) "Because intent is rarely susceptible of direct proof, it may be inferred from all the facts and circumstances disclosed by the evidence." (*People v. Kwok* (1998) 63 Cal.App.4th 1236, 1245 (*Kwok*).) "The felonious intent to commit theft may be inferred from the unlawful entry alone. [Citation.]" (*People v. Walters* (1967) 249 Cal.App.2d 547, 551.) Flight from the scene of a burglary, without reasonable explanation, is also evidence from which intent may be inferred. (*People v. Martin* (1969) 275 Cal.App.2d 334, 339.)

"Whether the entry was accompanied by the requisite intent is a question of fact for the jury." (*Kwok, supra*, 63 Cal.App.4th at p. 1245.) "'An appellate court must accept logical inferences that the [finder of fact] might have drawn from the circumstantial evidence.' [Citation.] 'Before the judgment of the trial court can be set aside for the insufficiency of the evidence, it must clearly appear that on no hypothesis whatever is there sufficient substantial evidence to support the verdict of the [finder of fact].' [Citation.]" (*People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1573, second & fourth bracketed insertions added.)

In *People v. Kittrelle* (1951) 102 Cal.App.2d 149, Mrs. Moye woke shortly before 5:00 a.m., when she felt the covers at the foot of her bed move as if someone were pulling at them. She saw a man leaning over the foot of her bed; he straightened up, and walked toward the doorway leading into the hall. Mrs. Moye screamed and the man ran; Mr. Moye woke and chased him out of the house. The man got in a car and drove away. Later that day, the defendant was arrested and Mrs. Moye identified him as the man who

had been in her bedroom. The defendant contended the evidence was insufficient to establish he entered the residence with intent to commit theft or rape. (*Id*. at pp. 154-155.) The court concluded: "Defendant was identified as the person who uninvited, before 5 o'clock in the morning, made his entry into the Moyes' house and into their bedroom. Obviously he was not there for any legitimate purpose. He awakened Mrs. Moye by pulling at the bedclothes …. When his presence was discovered he fled. The evidence and the reasonable inferences therefrom justify the conclusion that defendant entered the house with the intent to commit larceny and rape." (*Id*. at p. 156.)

In *People v. Moody* (1976) 59 Cal.App.3d 357, a babysitter awoke at 3:00 a.m. and heard a noise. She saw the defendant standing in the hallway with his arms outstretched. She gasped, and the defendant ran out the front door. When the police arrived, one officer hid in the bushes and saw the defendant come out of the yard of the house directly behind the house where the babysitter had seen him. When the officer told the defendant to freeze, the defendant ran; the officer chased and caught him. The defendant contended there was no substantial evidence of his intent to commit theft or a felony. (*Id*. at p. 362.) Noting that intent may be inferred from the circumstances of the case, including flight, the court disagreed: "Appellant entered the structure, to wit, a dwelling house, at night after all the doors had been locked and when discovered he had his arms outstretched toward the intended victim, a 15-year-old girl who was dressed only in a nightgown. When discovered he ran. Thereupon when confronted by a police officer appellant once again took flight. From the above facts, the jury could have concluded and there was substantial evidence to support a finding that appellant had either entered the house with an intent to commit theft or to commit rape." (*Id*. at p. 363.)

At dusk, 15 minutes after the occupants left the Ramirez house, D.S. and a companion were seen going through the door from the house into the garage. The companion was carrying a backpack, an item that could be used to carry away property. When McPhetridge banged on the garage door, the two ran out of the garage into the

yard; when McPhetridge began to climb over the gate toward them, they ran away through the backyard. The two young men did not have permission to be in the Ramirez house. No legitimate reason for their presence was offered. From these circumstances, including the unlawful entry and flight upon being discovered, the trier of fact inferred D.S. entered the house with the intent of committing theft or a felony. Substantial evidence supports that inference, and we cannot disturb that finding on appeal.

*In re Leanna W.* (2004) 120 Cal.App.4th 735 (*Leanna*), cited by D.S., is distinguishable. Leanna was found to have committed burglary after she entered the house of her grandmother, Ms. P., without permission and entertained guests at a going-away party. While Ms. P. was away, a neighbor saw Leanna in the house with 30 to 40 young people. There was alcohol on the table and counter, and Leanna said she was having a going-away party. The neighbor told Leanna the guests had to leave; the partygoers left, but returned later. The neighbor again told Leanna the guests had to leave and Leanna had to clean up. The guests left and Leanna returned the next morning to clean up. When Ms. P. returned home, she discovered several items were missing, including six bottles of liquor, and her Direct TV bill included charges for a boxing match and six adult movies on the date of Leanna's party. The juvenile court found the burglary allegations true, noting that utilities were used and alcohol was consumed in Leanna's presence. (*Id*. at p. 738.)

The appellate court reversed the burglary finding, concluding there was insufficient evidence that Leanna intended to commit a theft or felony when she entered her grandmother's house. It opined that consumption of Ms. P.'s alcohol or use of her utilities could give rise to an inference that Leanna entered with intent to commit theft. (*Leanna, supra*, 120 Cal.App.4th at p. 741.) "Critical to this rationale, however, is a conclusion that Leanna actually took or consumed the alcohol" or used the utilities. (*Ibid.*) The juvenile court, however, "expressly found that it could not tell what Leanna did while she was in the home." (*Ibid*.) "The mere possibility that Leanna consumed the

alcohol [or used the utilities] raise[d] nothing more than a suspicion, which d[id] not form a sufficient basis for an inference of fact." (*Ibid*.)

In *Leanna*, the court essentially concluded it could not infer from others' consumption of Ms. P.'s alcohol and use of her utilities that Leanna entered the house with the intent to commit theft. No such issue arose in this case. In this case, D.S. and his companion were the only persons seen in the Ramirez house at the time of the alleged burglary. There was no evidence of any relationship or acquaintance between D.S. or his companion and any occupant of the Ramirez house. There was no suggestion of any legitimate reason for D.S. and his companion to be inside the Ramirez residence while the occupants were away. D.S. and a companion carrying a backpack entered the home of a stranger without permission while the occupants were not present, then fled when they were discovered by McPhetridge. Unlike *Leanna*, there was sufficient evidence from which an intent to commit theft could be inferred.

## II. Ineffective Assistance of Counsel

Under both the Sixth Amendment to the United States Constitution and article I, section 15, of the California Constitution, a criminal defendant has a right to the effective assistance of counsel; that is, he has a right to "'the reasonably competent assistance of an attorney acting as his diligent conscientious advocate.'" (*People v. Ledesma* (1987) 43 Cal.3d 171, 215 (*Ledesma*).) A claim of ineffective assistance has two components: (1) the defendant must show counsel's performance was deficient, i.e., that it fell below an objective standard of reasonableness under prevailing professional norms; and (2) the defendant must establish prejudice as a result. (*Ledesma*, *supra*, 43 Cal.3d at pp. 216, 217.) If the defendant makes an insufficient showing on either one of these components, the ineffective assistance claim fails. (*People v. Holt* (1997) 15 Cal.4th 619, 703 (*Holt*).)

### *A. Deficient performance*

In evaluating counsel's performance, the reviewing court "must in hindsight give great deference to counsel's tactical decisions." (*Holt*, *supra*, 15 Cal.4th at 703.) It will

reverse a conviction on direct appeal on the ground of ineffective assistance of counsel only if the record demonstrates there could be no rational tactical purpose for counsel's omissions. (*People v. Lucas* (1995) 12 Cal.4th 415, 442.)

D.S. contends his counsel's performance was deficient because she failed to object to McPhetridge's identification of D.S. as one of the individuals he saw in Ramirez's garage. The record reflects that counsel did object immediately after McPhetridge identified D.S. The court permitted defense counsel to voir dire the witness as to the basis of the identification. Then, after establishing that McPhetridge observed the individuals in Ramirez's garage by looking through a window in the garage door, the court inquired:

> "THE COURT: All right. And -- now, when you identified this minor earlier as the person that you saw in the garage was it based on that observation or was it based on anything else?
>
> THE WITNESS: It was based on that observation."

Thus, the record does not bear out the assertion that D.S.'s attorney performed deficiently by failing to object to McPhetridge's in-court identification of D.S. as one of the individuals he saw in Ramirez's garage.

***B. Prejudice***

To show prejudice, "'[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citations.]" (*Ledesma, supra*, 43 Cal.3d at pp. 217-218.) D.S. has not shown that the in-court identification should have been excluded, and so has not demonstrated that any failure to object was prejudicial to him.

In *United States v. Crews* (1980) 445 U.S. 463 (*Crews*), the court considered when an in-court identification of the defendant should be suppressed as the fruit of his unlawful arrest. In *Crews*, photographs of the defendant were taken after he was illegally

arrested. Those photographs were later shown to a robbery victim in a photographic array, and she identified the defendant as the perpetrator of the crime. At trial, the victim again identified the defendant as her assailant.

Evidence obtained through violation of the Fourth Amendment prohibition of illegal searches and seizures is inadmissible at trial. (*Crews, supra*, 445 U.S. at p. 470.) This exclusion extends to any fruits of the illegal search or seizure, including observations made or statements overheard during an illegal detention. (*Ibid*.) In determining whether the victim's in-court identification of the defendant was the product of an unlawful detention, the Court stated:

> "A victim's in-court identification of the accused has three distinct elements. First, the victim is present at trial to testify as to what transpired between her and the offender, and to identify the defendant as the culprit. Second, the victim possesses knowledge of and the ability to reconstruct the prior criminal occurrence and to identify the defendant from her observations of him at the time of the crime. And third, the defendant is also physically present in the courtroom, so that the victim can observe him and compare his appearance to that of the offender." (*Crews, supra*, 445 U.S. at p. 471.)

Because none of these elements was the result of exploitation of the Fourth Amendment violation, the court concluded the in-court identification of the defendant was not a fruit of the illegal arrest. (*Crews, supra*, 445 U.S. at p. 471.) As to the first element, the victim's presence in court was not the result of any illegal conduct; she reported the crime, gave the police a full description of the suspect, and cooperated in their investigation before any police misconduct occurred. (*Id*. at pp. 471-472.) As to the second element, the victim constructed a mental image of her assailant from her observations at the time of the robbery, compared this image with defendant, and positively identified him as the robber. The illegal detention did not affect her ability to give accurate identification testimony. (*Id*. at p. 472.) As to the third element, an illegal arrest or detention does not bar a subsequent prosecution; a defendant is not a

suppressible fruit of the unlawful detention and "the illegality of his detention cannot deprive the Government of the opportunity to prove his guilt through the introduction of evidence wholly untainted by the police misconduct." (*Id.* at p. 474.)

In the present case, D.S. contends the first and second elements were the result of the unlawful detention. As in *Crews*, however, the witness who identified D.S. in court reported the crime and gave the police a description of the suspects before the unlawful detention occurred; his presence in court was not the result of any illegal detention. McPhetridge testified that his identification of D.S. was based on his observation of the suspects in the garage. There was no evidence contradicting that testimony. McPhetridge observed the suspects in the lighted garage, as they looked up at him after he banged on the garage door; he also saw them as he began climbing over the gate and they again looked up at him.

D.S. contends the in-court identification was tainted by an earlier in-field identification, presumably made at the time of the unlawful detention. There was no evidence before the court concerning any such in-field identification–that it occurred, when or where it took place, who was present, under what circumstances it was made, or what the result was. Evidence as to what occurred after the officer detained D.S., a detention the court ruled was illegal, was excluded on D.S.'s motion. Thus, there was no evidentiary basis on which the court could have concluded the in-court identification was tainted by illegal police conduct. D.S. has not shown that there is a reasonable probability that, if counsel had objected to McPhetridge's in-court identification, the result of the proceeding would have been different; he has not demonstrated that any failure to object to that identification prejudiced him. Accordingly, he has not established his claim of ineffective assistance of counsel.

## ***DISPOSITION***

The judgment is affirmed.

_____
HILL, J.

WE CONCUR:

_____
GOMES, Acting P.J.

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POOCHIGIAN, J.